

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

- (1) What is the nature and extent of claimant's injury and/or disability?
- (2) Whether respondent is entitled to a credit pursuant to K.S.A. 44-510a or K.S.A. 44-501(c).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant, a truck driver, suffered accidental injury on May 17, 1990, and litigated a workers compensation claim which was settled, based upon a 14 percent functional impairment as assessed by Dr. C. Reiff Brown, for a lump-sum settlement of \$20,672.52. Subsequent to the settlement, claimant returned to work as a truck driver. On July 9, 1994, claimant reinjured his back while working for respondent. At the time, claimant was carrying a fuel hose out of a hole when he slipped, twisted, and wrenched his back. As a result of this injury, claimant was unable to return to truck driving and has since done some light work in his wife's antique store. K.S.A. 44-510e(a) states in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.

As claimant is not back to work engaging in work equal to 90 percent or more of his average gross weekly wage earned at the time of the injury, claimant is entitled to a work disability under K.S.A. 44-510e.

In considering the work disability appropriate in this instance, the Appeals Board will consider first the loss of task performing ability which would be appropriate under these circumstances. While respondent argues that the restrictions placed upon claimant by Dr. Brown from claimant's 1990 injury would have already eliminated all tasks which were eliminated after the 1994 accident, the Appeals Board has difficulty accepting this argument. After the 1990 injury claimant was capable of returning to work as a truck driver. After the 1994 injury, claimant was not capable of physically performing work activities of

a truck driver and, as such, it appears from the evidence that claimant has suffered a work disability greater than that which occurred in 1990. As such, the Appeals Board rejects respondent's argument that claimant has suffered no loss of task performing abilities as a result of this accident.

Claimant was examined by two vocational experts, Jerry D. Hardin and Karen Crist Terrill. The opinions and reports of both experts were considered and discussed by various health care providers. Dr. C. Reiff Brown, an orthopedic surgeon, had the opportunity to examine and treat claimant after both the 1990 and the 1994 accidents. Claimant was also examined by Dr. Jane Drazek who had the opportunity to review reports of both Karen Terrill and Jerry Hardin. In reviewing the evidence in the record, the Appeals Board finds claimant's loss of task performing abilities falls somewhere in the range of 55 to 63 percent based upon the opinions of Dr. Brown and Dr. Drazek. It is the function of the trier of facts to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991). In this instance, the Appeals Board finds that claimant has suffered a 59 percent loss of ability to perform work tasks which he had performed over the 15 years preceding the accident.

The Appeals Board must next compare claimant's pre-injury and post-injury average weekly wage. Claimant has not returned to work as a truck driver as a result of his physical limitations. Claimant is working in his wife's antique store part-time at a substantially reduced wage. It is noted that claimant has filled out no applications for employment since his release by the doctor. Claimant did attempt through SRS to attend a computer science program through Dodge City Community College. Claimant's grades were good and he appeared to have an aptitude for this particular vocation as over the first 12 hours of classes his grade point average was 3.7. Claimant voluntarily quit this program because he did not feel he was getting anything out of the class and he did not feel he could sit through the classes and concentrate on learning the materials. This voluntary termination of this program by claimant appears to conflict with the fact that claimant appeared to be doing quite well in class and, if he had stayed in class, could potentially have led to a substantially better job. The Appeals Board, in considering claimant's apparent lack of effort, must consider the Court of Appeals' mandate in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, ___ P.2d ___ (1997). In Copeland, the Court of Appeals found that where a claimant does not put forth a good faith effort to obtain employment subsequent to an injury, the finder of fact is mandated to impute a wage for the purpose of considering claimant's post-injury wage earning ability. The Appeals Board finds that this claimant has not put forth a good faith effort to obtain employment in this instance, and a wage will be imputed pursuant to Copeland. Karen Terrill opined that claimant has the ability to earn \$6.50 per hour over a 40-hour week. This equates to a 47 percent loss of wages when compared to claimant's \$494.38 average weekly wage on the date of accident.

K.S.A. 44-510e requires claimant's loss of ability to perform work tasks be averaged together with the difference between the pre-injury and post-injury average weekly wage. In this instance, the 59 percent loss of task performing ability, when compared to claimant's 47 percent loss of wage earning ability, computes to a work disability of 53 percent.

The Appeals Board must next consider whether a credit pursuant to K.S.A. 44-510a would be appropriate. K.S.A. 44-510a(a) states in part:

If an employee has received compensation or if compensation is collectible under the laws of this state or any other state or under any federal law which provides compensation for personal injury by accident arising out of and in the course of employment as provided in the workers compensation act, and suffers a later injury, compensation payable for any permanent total or partial disability for such later injury shall be reduced, as provided in subsection (b) of this section, by the percentage of contribution that the prior disability contributes to the overall disability following the later injury.

In this instance, the vocational experts, Karen Terrill and Jerry Hardin, whose opinions were adopted by Dr. Brown and Dr. Drazek, considered claimant's prior injuries when computing claimant's loss of task performing abilities. The Appeals Board finds that appropriate consideration has been given to the prior limitations placed upon claimant as a result of the earlier injury and no credit under K.S.A. 44-510a would be appropriate.

However, K.S.A. 44-501(c) states in part:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation **shall** be reduced by the amount of functional impairment determined to be preexisting. (Emphasis added.)

Claimant settled his 1990 workers compensation claim for slightly over \$20,000 based upon a 14 percent whole body functional impairment. Pursuant to K.S.A. 44-501(c) the Appeals Board finds respondent is entitled to a reduction in claimant's award based upon the preexisting functional impairment assessed claimant for the earlier injuries. As such, the Appeals Board finds the 53 percent permanent partial disability awarded shall be reduced by 14 percent and claimant is awarded a 39 percent permanent partial disability to the body as a whole as a result of the injuries suffered with respondent on July 9, 1994.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish, dated July 26, 1996, should be, and is hereby, modified and claimant, Darrell W. Ehrlich, is granted an award against the respondent, Lampe Trucking, and its insurance carrier, Commercial Union Insurance, for an injury suffered on July 9, 1994, for a 39% permanent partial disability to the body as a whole.

Claimant is entitled to 20.57 weeks temporary total disability compensation at the adjusted rate of \$319 per week in the amount of \$6,561.83, followed thereafter by 159.68 weeks permanent partial disability compensation at the rate of \$319 per week in the sum of \$50,937.92, for a total award of \$57,499.75 all of which would be due and owing in one lump sum minus amounts previously paid as of the time of this award.

Pursuant to K.S.A. 44-536, claimant's contract of employment with claimant's counsel is hereby approved.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Underwood & Shane	
Transcript of Regular Hearing	\$285.50
Deposition of Mark Lampe	Unknown
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Bannon & Assoc.	
Deposition of Jane Drazek, M.D.	\$210.88
Deposition of Karen Crist Terrill	\$193.50
Kelly York & Assoc.	
Deposition of Jane Drazek, M.D.	\$310.15
Deposition of Jerry Hardin	\$348.80
Tri-State Reporting Services	
Deposition of David Parks	\$106.75
Deposition of Darrell Ehrlich	\$401.20
Owens, Brake, Cowan & Assoc.	
Deposition of C. Reiff Brown, M.D.	\$332.00
Deposition of C. Reiff Brown, M.D.	\$134.20

Barber & Assoc. Deposition of Karen Crist Terrill	\$219.20
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K. Pfannenstiel Reporting & Assoc. Deposition of Darrell Ehrlich	\$194.72
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IT IS SO ORDERED.

Dated this ____ day of January 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Henry A. Goertz, Dodge City, KS
Kendall R. Cunningham, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director